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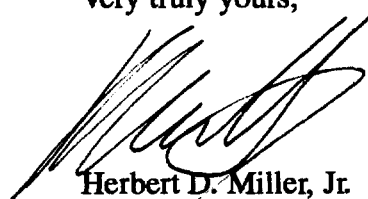
William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

Dear Mr. Caton:

Transmitted herewith, on behalf of Telephone and Data Systems, Inc. and United States Cellular Corporation, is their Opposition to the Petition to Intervene in CC Docket Number 94-11 filed by Portland Cellular Partnership.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Herbert D. Miller, Jr.

enc.

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D. C. 20554

IN RE APPLICATION OF

TELEPHONE AND DATA SYSTEMS, INC.

For facilities in the Domestic Public  
Cellular Telecommunications Service  
on Frequency Block B in Market 715,  
Wisconsin 8 (Vernon) Rural Service  
Area

CC Docket Number  
94-11

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MAR 17 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: Honorable Joseph P. Gonzalez  
Administrative Law Judge

**OPPOSITION TO PETITION TO INTERVENE**

Telephone and Data Systems, Inc. (TDS) and United States Cellular Corporation (USCC) file herewith, by their attorneys, their Opposition to the Petition of Portland Cellular Partnership ("Port Cell") to intervene herein.

**I. Summary**

PortCell makes no claim to be allowed to intervene as of right under §1.223(a) of the Rules. Its claims arising under § 1.223(b) are that its participation will assist the Commission in the determination of the designated issues and that it has an interest in the proceeding which places it in the category of intervenors contemplated by the *Hearing Designation Order (HDO)*. Both claims are incorrect.

PortCell proffers assistance arising from its alleged knowledge of USCC's "pattern of activities" involving the Portland, Maine licensee, Northeast Cellular Telephone Company, LP (Northeast), in which USCC is a 49 percent partner. But the instant case involves candor in the St. Tammany Parish, Louisiana *LaStar* proceeding, not who controls Northeast in the Portland, Maine proceeding, and the Commission itself has rejected PortCell's claims that there should be a hearing on the

question of whether USCC controls Northeast. After investigation, the Commission determined that Port Cell had neither presented a *prima facie* case nor raised a substantial and material question challenging USCC's non-control status. Northeast's history has no relevance to any issue in this proceeding and clearly the Presiding Administrative Law Judge should not overrule the Commission by holding a hearing about Northeast's history.

Moreover, PortCell has no legitimate interest in this proceeding because it cannot benefit from it. Even if the Commission made findings adverse to USCC here, the Commission clearly would not seek, or have any basis, to revoke or rescind the license of Northeast on account of the conduct of Northeast's minority owner in an entirely different proceeding. That this is the Commission's view is shown by the fact that the initial license issued to Northeast was **not** conditioned on the outcome of any proceedings stemming from Footnote 3 of the Commission's *LaStar* decision, even though contemporaneous grants to companies controlled by USCC were so conditioned. When the Commission said in the *HDO* that parties with pending petitions raising Footnote 3 issues against USCC or TDS in other proceedings "may file a petition to intervene pursuant to § 1.223," it did not refer to parties with pending petitions against Northeast or other entities other than USCC or TDS. Instead, it intended to identify a class of intervenors with a stake in the outcome; *i.e.*, those which might possibly benefit from a ruling against USCC in the instant proceeding. A petitioner against Northeast, which is **not** controlled by TDS or USCC, does **not** have a stake in the outcome, because it cannot benefit from the outcome here, and is not in the class of persons identified by the *HDO*.

## **II. Background**

Port Cell was, at one time, the licensee of the wireline cellular facility in Portland, Maine. However, that award was vacated by the Court of Appeals for the

District of Columbia Circuit four years ago (*Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F. 2d 1164 (D.C. Cir. 1990) and, on remand, the Commission dismissed the Port Cell application on a finding, consistent with the Court's *Decision*, that Port Cell was not financially qualified. Northeast - a partnership in which USCC has a **minority** interest -- was eventually designated as the tentative selectee, and Port Cell filed a petition against Northeast, seeking denial of Northeast's application on the theory, *inter alia*, that USCC and TDS were the real parties in interest behind the Northeast application. Port Cell asked the Commission to hold a hearing on the matter. Port Cell supplemented its attempted showing and request for hearing by a December 20, 1991 letter calling the Commission's attention to Judge Chachkin's *La Star* initial decision. There, Port Cell claimed:

"We believe that Judge Chachkin's decision in *La Star* supports Port Cell's position in the above captioned proceeding that a hearing must be held to determine whether the alleged owner of Northeast Cellular Telephone Company L.P. actually controls the company or whether it is in fact controlled by USCC."

After requesting, receiving, and considering an evidentiary showing on the question of control, the Commission denied Port Cell's petition, as supplemented, by *Memorandum Opinion and Order* released on June 4, 1993 (nearly one year after the release of the Commission's own *La Star* decision on June 15, 1992). There, the Commission denied Port Cell's request for a hearing:

"[W]e find Port Cell's allegations that either USCC or TDS controls Northeast to be unsupported. . . . Accordingly, no evidentiary hearing is required. . . . Moreover, even if a prima facie case had been presented, Northeast's response makes it clear that no substantial and material questions of fact exist on this issue." (FCC 93-296, released June 4, 1993).

Unlike numerous authorizations granted to entities controlled by USCC, Northeast's authorization in the Portland, Maine market was **not** conditioned on the outcome of the *La Star* or any other proceeding involving USCC. Port Cell next filed a Petition for Reconsideration on July 2, 1993, in which it attempted to dispute the

Commission's findings that TDS/USCC were not in control of Northeast and in which it argued that grant of Port Cell's application had been in error because USCC's character qualifications, left dangling by virtue of footnote 3 to the *La Star* decision, should be resolved before Northeast's application could be granted.<sup>1</sup>

**II. The Matters Concerning which Port Cell Seeks to "Assist" the Commission by Presenting Evidence Have Already Been Decided by the Commission, Adversely to Port Cell.**

Port Cell seeks to intervene in order to turn this hearing into the very inquiry about control of Northeast **which Port Cell previously requested and which the Commission specifically declined to conduct.** Port Cell states,

"Port Cell is knowledgeable concerning USCC's pattern of activities in circumstances similar to those in La Star and believes that it can assist the Commission in the determination of the issues raised in the HDO. Port Cell therefore respectfully requests leave to intervene in this proceeding."

Port Cell's assertions about control matters involving Northeast have **already been specifically rejected by the Commission** and therefore provide no valid basis for allowing Port Cell to intervene here. To allow intervention would be to reject the Commission's express finding that USCC did not, in fact, control Northeast.<sup>2</sup>

Two days after filing its intervention petition in this proceeding, Port Cell filed with the Commission a document entitled "Motion to Set Aside Grant and Designate for Hearing." A copy is provided in Attachment A to this Opposition. There, Port Cell asked the Commission to set aside Northeast's Portland, Maine

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<sup>1</sup> The Commission also ordered that Port Cell's interim operating authority would terminate when Northeast commences service, FCC 93-296, ¶ 35. Port Cell asked the Commission to stay this action, which the Commission declined to do by *Order* released on August 19, 1993. On September 16, 1993, the Court of Appeals denied a stay motion which Port Cell filed there, and on November 24, 1993 the Court also denied a request for rehearing *en banc*.

<sup>2</sup> It seems obvious that if Port Cell is permitted to adduce evidence in this proceeding about the Portland, Maine market, Northeast would have to consider seeking to intervene here, thereby further expanding the proceeding.

cellular grant and to designate its application for hearing to determine whether USCC has been in control of Northeast.<sup>3</sup> That is, of course, precisely what the Commission refused to do in its June 4, 1993 *Memorandum Opinion and Order* in the Portland, Maine proceeding, of which Port Cell sought reconsideration on July 2, 1993. If the Commission denies this request, it will again have denied Port Cell's request made on this issue. If the Commission grants the request, there will be a hearing in the Northeast proceeding, where it belongs. In neither case does the issue belong here.

**III The HDO Does Not Contemplate Inquiry into Extraneous Matters such as Those Sought to be Litigated by Port Cell.**

The *HDO* appears to contemplate a thorough determination of whether USCC lacked candor in the *La Star* proceeding. It states,

"[A]lthough we only discuss Nelson's testimony about the functions of the La Star Management Committee herein, we will not limit the trier of fact to examine this issue only. We outline that subject only as an example of substantial and material questions of fact which exist as to whether USCC lacked candor or misrepresented facts to the Commission. We believe that the presiding administrative law judge should be given authority to examine all of USCC's conduct during the La Star proceeding and not be limited to the single instance described here." (*HDO*, ¶ 35).

Although the *HDO* contemplates a thorough determination of **this** question, it does **not** contemplate an unbounded, omnibus inquiry into the very different question of whether USCC exercised undue control over the applicant in the Portland, Maine cellular market or, for that matter, in any other cellular market. That would be improper even if the Commission had not already decided the question of control in the Portland, Maine market. The matters into which Port Cell proposes to delve would require an enlargement of issues to specify an issue as to USCC's control of

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<sup>3</sup> The Port Cell intervention petition was filed by Michael B. Barr, Esq. The Port Cell Motion to Set Aside Grant and Designate for Hearing was filed by L. Andrew Tollin, Esq. and Michael Deuel Sullivan, Esq., who represent NOCGSA in the present proceeding.

Northeast, in the face of the Commission's prior determination that neither a *prima face* basis for such an issue nor a substantial and material question of fact exists.

**IV. Port Cell is Not Within the Class of Parties Invited by the Commission to Seek to Intervene, and its Intervention would be Improper Under Section 1.223 of the Rules.**

Port Cell does not seek to intervene as of right pursuant to Section 1.223(a) of the Rules, and acknowledges (Port Cell Petition, p. 1) that its proposed intervention is pursuant to Section 1.223(b). That section provides,

"The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular state of the proceeding."

As noted above, the only showing as to how Port Cell's "participation will assist the Commission in the determination of the issues in question" relates to conduct in the Portland, Maine market, which has nothing to do with this proceeding. Nor has Port Cell acknowledged (as required by Section 1.223(b)) that what it proposes to do would require the specification of an additional issue, unrelated to this proceeding, although that would clearly be the case. There is, therefore, no basis in Section 1.223(b) of the rules for Port Cell's intervention.

Port Cell relies on Paragraph 38 of the *HDO* for the following proposition:

"The Commission in the *HDO* also invited other parties who had raised character qualifications issues against USCC and its parent, Telephone & Data Systems, Inc. in other proceedings to file petitions to intervene in this instant proceeding, pursuant to the Commission's rules." (Port Cell petition, p. 2).

That is not what the Commission said. It said,

"We recognize that various other parties have raised footnote three issues against either USCC or TDS in other proceedings. Any of those other parties which have pending petitions alleging these

character issues may file a petition to intervene in this proceeding pursuant to Section 1.223 of the Commission's Rules." (*HDO*, ¶ 38).

That is a much narrower "invitation" than Port Cell claims. First, the *HDO* refers only to entities which have raised "footnote three issues" against USCC or TDS. Entities which have attempted to raise character questions other than footnote three issues were not "invited." **And the only "character issues" raised by footnote three are candor issues**, concerning which Port Cell does not even purport to be in a position to help the Commission. Second, when the Commission spoke of parties which had raised Footnote three issues in other proceedings, it must have been referring to **unresolved** Footnote three issues; the issue sought to be raised by Port Cell has already been resolved by the Commission, and Port Cell is now seeking reconsideration of that resolution. Finally, the Commission spoke of intervention pursuant to Section 1.223(b)<sup>4</sup>; it did not purport to allow intervention outside the scope of that section, by entities failing to demonstrate any way in which intervention would assist the Commission in resolving the existing issues.

**V. No Legitimate Interest of Port Cell Would be Served by Allowing it to Intervene.**

Port Cell is not in the class of intervenors whom the Commission "invited" to intervene, for yet additional reasons. Port Cell has no pending petition against TDS or USCC; its petition is against Northeast. Moreover, since Port Cell is not an applicant for the Wisconsin RSA 8 authorization, Port Cell would derive no direct benefit from the denial of TDS' Wisconsin RSA 8 application. Furthermore, since the Portland, Maine grant to Northeast -- in which USCC is only a minority partner -- was not conditioned on the outcome of this or any other proceeding, Port Cell could not derive even an indirect benefit. Port Cell simply has no legally cognizable

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<sup>4</sup> Actually, the Commission referred to Section 1.223 as a whole. However, Section 1.223(a) refers to intervention as of right only by entities subject to objectionable interference, which Port Cell obviously can not and does not claim.



interest to protect in this proceeding, and has not even attempted to demonstrate that it has standing.

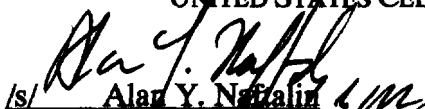
### Conclusion

Port Cell's contentions that USCC was improperly in control of Northeast have been expressly rejected by the Commission, and have nothing to do with this proceeding. To allow Port Cell to intervene here, to present evidence of conduct in the Portland, Maine market -- in the face of the Commission's express determination that USCC/TDS do not control Northeast -- would contravene the Commission's determination that there is no reason to inquire into that matter; for Port Cell to adduce the evidence it proposes to adduce would also require the specification of an additional issue having nothing to do with the issues on which the Commission has directed that this case be decided. Accordingly, Port Cell's Petition to Intervene should be denied.

Respectfully submitted,  
TELEPHONE AND DATA SYSTEMS, INC.  
UNITED STATES CELLULAR CORPORATION


By

/s/

  
Alan Y. Naftalin  
Alan Y. Naftalin


By

/s/

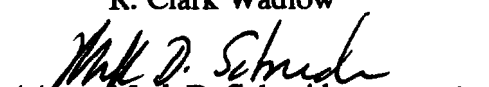
  
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*Its attorneys*

March 17, 1994

## Certificate of Service

I, Richard Massie, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by First Class United States Mail, postage prepaid:

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\* By hand

/s/   
Richard Massie

March 17, 1994